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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CARL SWINNEY, Defendant and Appellant.	B299452 (Los Angeles County Super. Ct. No. BA450026)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Scott A. Taryle and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Carl Swinney was convicted of the first degree murder of Daren Clark with a felony murder special circumstance. On appeal, he contends his conviction should be reversed due to insufficiency of the evidence, inadequate jury instructions, erroneous evidentiary rulings, prosecutorial misconduct, and improper ex parte communications by the court clerk. He further argues the felony-murder special-circumstance finding must be stricken on the basis of instructional error and because the special circumstance fails to sufficiently narrow the class of persons subject to the enhanced penalty. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Larry Williams worked at a Los Angeles laundromat. Williams typically stayed overnight at the laundromat and opened the business in the morning. On April 8, 2016, Williams worked at the laundromat in the morning and returned for the night at 11:45 p.m. Williams found the door to the laundromat unlocked, which was unusual. Williams's coworker Daren Clark was responsible for locking the door when he left after work. The laundromat's storage room was not visible from the entrance to the laundromat. When Williams entered the storage room, he found Clark's body on the concrete floor.

Clark died from multiple blunt force trauma to the head; he suffered a subdural hemorrhage, indicating the head trauma was severe. He had sustained five separate lacerations to his head and scalp, each of which represented a strike or blow. Clark had injuries to both sides of his scalp, multiple abrasions on both sides of his face, bruises on his face and head, and lacerations inside his mouth. He had abrasions on his hands and legs in the areas where he was bound with plastic ligatures referred to as

zip ties. His position, face-down and bound, may have hastened his death but did not cause it. No other possible causes of death were identified during Clark's autopsy. Clark's death was determined to be a homicide.

Inside the laundromat, an ATM had been severely damaged: According to Williams, "Somebody broke in it and just ripped [it] off like peeling a banana." The ATM's locked exterior door had been pried open, and there were pry marks on a slot where the money was dispensed. There were also pry marks on a coin exchanging machine affixed to the laundromat wall. The recording system for the laundromat's security cameras, mounted in the storage room, was missing.

Drops of Swinney's blood were found on the floor adjacent to the ATM, on the interior surface of the ATM door, and on some currency left inside the machine. Clark's DNA was found on one of the plastic ligatures that bound him. A rubber work glove was found in the parking lot immediately outside the laundromat door, but the DNA recovered from it was insufficient for analysis.

Swinney was arrested and placed in a monitored jail cell with a police operative posing as another arrestee; their conversation was recorded. Swinney told the operative the incident was a "lick," meaning a robbery. Swinney took credit for the crime, stating it was his idea and not his co-participant's plan. Clark "wasn't supposed to die," Swinney said. They had tied Clark up with his arms and feet together. Swinney said he did not know how Clark died, as "[unintelligible] only hit the [n----] in the head a couple of times. Fuck, that fool dead."

The operative commented, "[Y]ou must have a fucking hard-ass punch if you [unintelligible] punch somebody in the head."

"Crazy," responded Swinney.

The operative said, "So it was fast. It wasn't like you had time to get out. It was just one hitter quitter."

"Yeah," Swinney said.

"Not that serious," said the undercover operative.

Swinney agreed it was "not that bad but . . . it's just the way that n---- was."

Swinney told the operative he had checked on Clark, and there was "no response." Swinney said he had stolen the recording system from the laundromat, so he was confident the police had no camera images of him.

Swinney said he "robbed the ATM" and cut himself in the process, causing himself to bleed substantially. After the police collected his DNA, Swinney told the operative, "It's over, bro. They got me."

Swinney and codefendant Issac[1] Eaton were charged with first degree murder (Pen. Code, § 187, subd. (a)),[2] with the special circumstances allegations that the murder was committed in the course of a robbery (§ 190.2, subd. (a)(17)(A) and in the course of a burglary (§ 190.2, subd. (a)(17)(G)). The defendants were separately tried.

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[1] The codefendant's name was spelled inconsistently in the record. We adopt the spelling used in the information.

[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

At trial, in addition to the evidence above, the prosecution presented evidence Swinney was a self-admitted member of a gang engaged in a pattern of criminal activity including murder, firearms possession, graffiti and vandalism, possession for sale of narcotics, shootings, and prostitution. An expert witness testified about specific convictions of other members of the gang to serve as predicate offenses for the gang enhancement. The expert witness testified the evidence did not support a conclusion the crime here was committed for the benefit of or at the direction of a gang.

Swinney declined to testify, and the defense did not present an affirmative defense. The jury found Swinney guilty of first degree murder and also found the murder was committed while Swinney was engaged in the commission of "the crime of robbery and/or burglary within the meaning of Penal Code Section 190.2[, subdivisions] (a)(17)(A) and (G)." The jury found the gang enhancement allegation not true.

Swinney was sentenced to life imprisonment without the possibility of parole (LWOP). He appeals.

DISCUSSION

I. Sufficiency of the Evidence

Swinney acknowledges participating in the incident at the laundromat that led to Clark's death but contends the evidence was insufficient to support his conviction of first degree felony murder. A person may be convicted of first degree felony murder for a death occurring in the course of a limited number of felonies, including burglary and robbery, if (1) the "person was the actual killer"; (2) the person aided or abetted the commission of murder in the first degree; or (3) the "person was a major participant in the underlying felony and acted with reckless

indifference to human life." (§ 189, subd. (e).) The prosecution proceeded under both the first and third theories. The primary theory was Swinney was the actual killer, and the alternative theory was Swinney did not inflict the fatal blow but was guilty of first degree murder because he was a major participant in the underlying crime and acted with reckless indifference to human life. The evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt Swinney committed first degree felony murder under either theory.

" '[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.' [Citation.] ' "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' [Citation.] A reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] '[A]n appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.' [Citation.] We do not reweigh the evidence or resolve conflicts in the testimony when determining its legal sufficiency. [Citation.] Rather, before we can set aside a judgment of conviction for insufficiency of the evidence, 'it must clearly appear

that upon no hypothesis whatever is there sufficient evidence to support [the jury's finding].' " (*People v. Garcia* (2020) 46 Cal.App.5th 123, 144–145 (*Garcia*).)

A. Actual Killer

Presuming in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, we conclude there was sufficient evidence from which a reasonable juror could find Swinney was Clark's actual killer. During Swinney's recorded conversation with the undercover operative, Swinney either agreed with or did not dispute the operative's statements implicating Swinney as the person who personally struck Clark with the blows that caused Clark's death. " 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) Under this provision, 'If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citations.] 'For the adoptive admission exception to apply, . . . a direct accusation in so many words is not essential.' [Citation.] 'When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the

limited purpose of showing the party's reaction to it. [Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.)

While speaking with the undercover operative, Swinney claimed the scheme had been his idea, not Eaton's. "We" tied Clark up, Swinney told the operative. Clark "wasn't supposed to die," Swinney said; what happened was that "[unintelligible] only hit the [n-----] in the head a couple of times."

The undercover operative commented, "Damn, . . . you must have a fucking hard-ass punch if you [unintelligible] punch somebody in the head."

"Crazy," Swinney responded. Viewing this evidence in the light most favorable to the verdict, the jury could reasonably have concluded by not denying he had punched Clark, Swinney implicitly adopted the operative's statement he had thrown a "hard-ass" punch at Clark, causing his death.

Similarly, later in the conversation, the operative remarked, "It was just one hitter quitter." Swinney answered, "Yeah." The operative also said, "You knew that fool died when you left, you knew he was dead? Oh, he died instantly then. Damn, you hit him with your fist? Motherfucker, you got a strong-ass fucking—he probably, probably hit his head when he hit the ground. You've never seen those videos on YouTube where they hit people in the head and they die from hitting the ground?" These comments and questions clearly implied Swinney had personally hit Clark hard enough to kill him, and there is nothing to suggest Swinney was unable to hear, understand, or reply to them. The jury was entitled to consider Swinney's failure to contest the operative's assertions he had

punched and killed Clark as a tacit admission of the truth of those statements.

Swinney contends his response, "Crazy," cannot be considered an adoptive admission because it is speculative whether Swinney understood the word "you," as used by the operative, to mean Swinney personally as opposed to referring more generally to the two perpetrators together. He takes the position the operative's statement did not call for a response, because he was merely passing the time in desultory conversation; and if he adoptively admitted anything it was merely that he was strong, an advantageous quality in a jail context. He also claims Swinney's subsequent statement he did not "even know how that shit happened, man" and other comments should be understood as a denial of the operative's statement. Finally, he claims the record shows he was preoccupied with DNA evidence and not paying attention to the operative when the operative returned to the subject of hitting Clark and Swinney's strength. As the evidence supported a reasonable inference the accusatory statements were made under circumstances affording a fair opportunity to deny them, "whether defendant's conduct actually constituted an adoptive admission bec[ame] a question for the jury to decide." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1011, disapproved on other grounds in *People v. Loyd* (2002) 27 Cal.4th 997, 1007.) Swinney's arguments do not establish the evidence could not as a matter of law constitute adoptive admissions; they are arguments why he believes the jury, while weighing the evidence, should have decided Swinney's reactions were not adoptive admissions. Swinney's arguments are in essence an invitation to reweigh the

evidence, which we cannot do. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27 (*Lindberg*).)

Swinney argues it was "a matter of speculation" whether he personally struck Clark, and he asserts the prosecutor's argument he had said he "only hit the [n-----] a couple of times" was erroneous because that portion of the recording was unintelligible. The prosecutor argued " 'reasonably possible interpretations to be drawn from the evidence' " (*People v. Meneses* (2019) 41 Cal.App.5th 63, 71), and this was a reasonably possible interpretation given Swinney's overall description of the incident and the context of the conversation, in which the operative followed Swinney's statement about hitting Clark with repeated uncontested statements identifying Swinney as the attacker. Swinney also asserts the absence of a direct admission to hitting Clark was affirmative evidence he did not hit Clark, as he had "forthrightly" admitted to other conduct such as tying Clark up. These arguments about how to weigh the evidence are more appropriately directed to the jury than to the appellate court. (See *Lindberg*, *supra*, 45 Cal.4th at p. 27.) It is the jury's role "to determine the effect and value of the evidence addressed to it." (Evid. Code, § 312.) Neither argument establishes the evidence was insufficient to support a jury determination Clark was the actual killer.

Alternatively, Swinney contends even if there is substantial evidence from which the jury could have concluded he hit Clark, it remains speculative whether his blows were a substantial factor in the death because there was no evidence any of his blows struck Clark in the head or caused lacerations. He argues the prosecutor's arguments about precisely how events unfolded were merely speculative and insufficient to support a conviction.

These arguments, again, are an invitation to reweigh the evidence; but our role is not to reweigh the evidence and revisit credibility determinations, only to determine whether there was substantial evidence from which the jury could convict Swinney on this ground. (*Garcia*, *supra*, 46 Cal.App.5th at pp.144–145.) The evidence was sufficient to permit a reasonable jury to find beyond a reasonable doubt Swinney was Clark's actual killer.

In his reply brief, Swinney relies on *Garcia*, *supra*, 46 Cal.App.5th 123, to argue "evidence that Swinney helped bind the victim or otherwise facilitated the accomplice's killing were insufficient to show that he was one of the actual killers" if the binding was not the actual cause of death. This case is inapposite here, where there was evidence from which the jury could have concluded Swinney personally killed Clark.

B. Reckless Indifference

On appeal, Swinney argues the evidence was insufficient to prove he acted with reckless indifference to human life, principally because there was no evidence prior to entering the laundromat that his actions would create a grave risk of death: Neither participant was armed, and Swinney may not even have known someone was present on the premises given the nature of the business, the presence of security cameras, the time of day, and the fact that the storage room was not visible from the entrance to the laundromat. At most, he argues, the evidence shows the men brought zip ties and intended to restrain anyone who interfered with their plan to break into the ATM; they could not have known anyone they might encounter might resist.

A defendant acts with reckless indifference to human life when he or she " ' "knowingly engag[es] in criminal activities known to carry a grave risk of death." ' " (*People v. Banks* (2015) 61 Cal.4th 788, 801.) "Reckless indifference to human life has a subjective and an objective element. [Citation.] As to the subjective element, '[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,' and he or she must consciously disregard 'the significant risk of death his or her actions create.' [Citations.] As to the objective element, ' "[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." ' [Citation.] 'Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient' to establish reckless indifference to human life; 'only knowingly creating a "grave risk of death" ' satisfies the statutory requirement." (*In re Scoggins* (2020) 9 Cal.5th 667, 677 (*Scoggins*).)

"Determining a defendant's culpability under the special circumstances statute requires a fact-intensive, individualized inquiry." (*Scoggins*, *supra*, 9 Cal.5th at p. 683.) In *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), the California Supreme Court identified factors to consider when assessing a jury's finding a defendant acted with reckless indifference to human life: (1) whether the defendant knew weapons would be used during the felony and/or used weapons during the felony; (2) whether the defendant was physically present at the crime and had opportunities to restrain the crime and/or aid the victim;

(3) the duration of the felony; (4) the defendant's knowledge of his or her cohort's likelihood of killing; and (5) the defendant's efforts to minimize the risks of violence during the felony. (*Id.* at pp. 618–623; see also *Scoggins*, at p. 677.) None of these factors is necessary, nor is any one of them necessarily sufficient, to demonstrate a person acted with reckless indifference. (*Clark*, at p. 618.)

We analyze the totality of the circumstances to determine whether Swinney acted with reckless indifference to human life. (*Scoggins*, *supra*, 9 Cal.5th at p. 677.) With respect to the first *Clark* factor, there was no evidence any weapons were used during the felony; the victim was killed by blunt force trauma to the head. On the second *Clark* factor, evidence of Swinney's presence at the murder supported a finding he acted with reckless indifference to human life. "Proximity to the murder and the events leading up to it may be particularly significant where . . . the murder is a culmination or a foreseeable result of several intermediate steps . . . . In such cases, 'the defendant's presence allows him to observe his cohorts so that it is fair to conclude that he shared in their actions and mental state. . . . [Moreover,] the defendant's presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders.' " (*Clark*, *supra*, 63 Cal.4th at p. 619; see *Garcia*, *supra*, 46 Cal.App.5th at p. 148 ["Presence at the scene of the murder is a particularly important aspect of the reckless indifference inquiry"].) Here, the evidence established Swinney was present at the laundromat and in the storage room where Clark's body was left. As discussed above, the evidence permitted the

conclusion Swinney was the actual killer, but at a minimum, there was evidence Swinney tied Clark up, struck Clark or was aware Clark had been hit in the head multiple times, checked on Clark and saw he was unresponsive, and left Clark immobilized and face down on the floor. Additionally, Swinney personally stole the recording system for the laundromat's security cameras from the same room where Clark's body was found. From this evidence a reasonable jury could conclude Swinney was present at the scene of the murder—a fact tending to establish that if he was not the actual killer, Swinney shared in his co-participant's actions and mental state. (*Clark*, *supra*, at p. 619.)

There was no evidence suggesting Swinney attempted to restrain his co-participant's conduct or aid Clark. (*Garcia*, *supra*, 46 Cal.App.5th at p. 148 [substantial evidence supported robbery-murder special-circumstance finding where defendant "did not restrain the actions of his accomplices or check on the condition of his victims"].) The killing itself showed no restraint: Clark suffered no defensive injuries, suggesting he had not resisted, yet he was severely beaten and left face down on the floor with his hands and feet bound. He had five separate lacerations on his head and scalp from repeated blows severe enough to have caused fatal hemorrhaging. As for aid, Swinney checked on Clark and found him nonresponsive, but rather than help Clark or summon help for him, Swinney chose to steal the recording system from the storage room, demonstrating he prioritized avoiding detection above Clark's life. Also, Swinney left Clark tied up and face down in the back room of a building, where there was little chance he would have been discovered in time for medical aid to be provided.

Swinney contends there was no evidence he knew, or any lay people reasonably must have known, that punching a person five times in the head created a grave risk of death. The jury could reasonably have concluded both law-abiding lay people and Swinney would have understood the brutal beating of Clark created an extreme risk of death, as would leaving a person bound, bleeding, and severely beaten around the head in a location where he was not likely to be found for hours and with no effort to send aid.

The third *Clark* factor is "[t]he duration of the interaction between victims and perpetrators," which is significant because a longer duration of interaction increases the likelihood the victim will be harmed. (*Clark*, *supra*, 63 Cal.4th at p. 620.) While no specific evidence of duration was introduced, the evidence demonstrated a considerable amount of force and effort was involved in accessing the inside of the ATM and attempting to gain entry to the coin exchange machine. The coin exchange machine bore pry marks, the ATM had been torn away like "peeling a banana," and Swinney injured himself while breaking into the ATM. This evidence supported the reasonable conclusion this activity consumed a substantial amount of time, increasing the risk of harm and death to Clark.

The fourth *Clark* factor is whether the defendant had "knowledge of factors bearing on a cohort's likelihood of killing," and the final *Clark* factor considers whether the defendant undertook "apparent efforts to minimize the risk of violence." (*Clark*, *supra*, 63 Cal.4th at pp. 621–622.) No evidence was introduced at trial on these factors.

Considering all these factors, we conclude substantial evidence supported a finding Swinney acted with reckless indifference to human life.

Swinney attempts to undermine the reckless indifference element with two contradictory claims. First, Swinney maintains the recorded conversation with the undercover officer shows he was "utterly surprised" to find out upon his arrest that Clark had died, as he had ensured Clark could breathe when he tied him up; he contends this was evidence he had no subjective awareness of the risk of death to Clark. Not knowing Clark had actually died does not mean Swinney did not appreciate the grave risk of death he created. The evidence supported the conclusion leaving Clark badly beaten, tied up, and face down in a secluded location, without attempting to render or secure aid or to ensure he would be discovered, created a grave risk of death, and Swinney knew this, but was indifferent to it: He checked on Clark's condition, suggesting he knew the danger in which he had placed Clark; and when he discovered Clark was nonresponsive, Swinney not only did not render aid but stole the recording system to avoid detection. The evidence supported the conclusions Swinney was aware of the risk he had created and acted with reckless indifference to Clark's life.

Second, Swinney asserts he did know at the time of the incident Clark was dead—this is in order to excuse his failure to take even the most perfunctory action to lessen the jeopardy to Clark, such as loosening the zip ties, propping him up so he could breathe better, or calling for medical help. The evidence does not establish Swinney was aware Clark had died, only that Swinney saw he was not responsive; and Swinney's failure to aid Clark

was, as discussed above, evidence supporting the determination he acted with reckless indifference to human life.

Swinney contends this case is similar to *In re Taylor* (2019) 34 Cal.App.5th 543, in which after-the-fact indifference to the death occurring during the felony, standing alone, was not substantial evidence of reckless indifference. "[E]ven if a defendant is unconcerned that a planned felony resulted in death, as Taylor was, there must also be evidence that the defendant's participation in planning or carrying out the crime contributed to a heightened risk to human life." (*Id*. at p. 560.) Here, in contrast, the evidence of reckless disregard is not limited to Swinney's after-the-fact attitude toward the crime; there is evidence Swinney personally planned and carried out this crime, creating a grave risk of death. *Taylor* is inapposite.

II. Failure to Instruct Sua Sponte That Defendant's Conduct Had to be a "Substantial Factor" in the Homicide

The court instructed the jury with CALCRIM No. 540A, the instruction on first degree felony murder where the defendant allegedly committed the fatal act. In relevant part, this instruction advised the jury of the People's burden to prove beyond a reasonable doubt "[w]hile committing robbery or burglary, the defendant caused the death of another person." On appeal, Swinney argues the trial court should have instructed the jury Swinney could not be deemed the actual killer unless his conduct was a substantial factor in the homicide, and he contends the jury may have concluded Swinney's conduct was not a substantial factor in the homicide but found him an actual killer anyway. "We consider the challenged instruction in the context of the instructions and record as a whole to ascertain whether

there is a reasonable likelihood the jury impermissibly applied the instruction." (*People v. Rivera* (2019) 7 Cal.5th 306, 329 (*Rivera*).) There is no reasonable likelihood the jury misapplied the jury instruction in the manner Swinney posits.

The Bench Notes to CALCRIM No. 540A provide, "If the facts raise an issue whether the homicidal act caused the death, the court has a **sua sponte** duty to give CALCRIM No. 240, *Causation*." Swinney argues his proposed substantial factor instruction should have been given because there existed a question of causation. Swinney, however, does not identify any evidence in the record that he committed a homicidal act that did not cause Clark's death. He asserts, "[n]o testifying witness saw exactly where Swinney's blows, if any, landed, or if any of his blows were even to the head." Under the instructions given to the jury, if the jury believed Swinney did not strike Clark, or if it speculated either that Swinney improbably managed to swing at but miss the man lying bound on the floor or that he struck another part of Clark's otherwise unbruised body, then the jury, applying CALCRIM No. 540A, would have concluded Swinney did not commit the fatal act, and it would have proceeded to analyze Swinney's potential liability under CALCRIM No. 540B, which covered the situation in which the other perpetrator allegedly caused Clark's death. All possible theories of causation encompassed by the evidence in this case were covered by CALCRIM Nos. 540A and 540B. Additionally, the prosecutor's argument did not encourage the jury to find Swinney guilty as an actual killer based on nonfatal conduct. To the contrary, the prosecution's theory was clear: If Swinney was the person who dealt the fatal blow, he was the actual killer, and if not, he was liable as a major participant in the felony who acted with reckless

indifference to human life. There is no reasonable likelihood the jury was misled into believing Swinney could be found the actual killer without having personally inflicted fatal injuries on Clark.

III. Failure to Instruct the Jury Sua Sponte That the Actual Killer is One Who Personally Killed the Victim

Based on the recent decision in *Garcia*, *supra*, 46 Cal.App.5th 123, Swinney argues in supplemental briefing the jury should have been instructed the actual killer is the one who personally killed the victim, not one who only did an act that caused the death. In *Garcia*, the victim died due to asphyxiation after his mouth was covered with duct tape. (*Id*. at p. 136.) At trial, the prosecutor argued the jury could find true the robbery-murder special circumstance on the theory the defendant was an actual killer because he did an act that caused the death of another person by giving the duct tape, " 'the instrumentality of death,' " to a co-perpetrator. (*Id*. at p. 149.) As here, the *Garcia* jury was instructed with CALCRIM No. 730 that the special circumstance could be found true if the defendant " 'did an act that caused the death of another person.' " (*Garcia*, at pp. 149–150.) The *Garcia* Court of Appeal found CALCRIM No. 730 insufficient because it "allowed the jury to find the special circumstance true if it determined that [the defendant] 'caused' [the victim's] death even if it did not find beyond a reasonable doubt that [the defendant] participated in the taping" of the victim's face—that is, the jury could have found the defendant guilty just because he handed his co-perpetrator the tape. (*Garcia*, at p. 155.) The error was not harmless because the prosecutor relied on this improper theory of indirect actual killer guilt. (*Id*. at pp. 156–157.)

Swinney argues the jury instructions were similarly problematic here, and the jury could have concluded he was an actual killer based on general causation principles. Considering the instruction in the context of the instructions and record as a whole (*Rivera*, *supra*, 7 Cal.5th at p. 329), we find no reasonable likelihood the jury impermissibly applied the instructions. Here, the prosecution's actual killer theory was premised on the argument Swinney personally inflicted harm on Clark that caused his death: Swinney tied Clark up, beat him savagely, and left him to die on the laundromat floor. The prosecutors did not argue Swinney could be convicted on an actual killer theory for merely facilitating a codefendant's actions, as in *Garcia*; to the extent the jury was not convinced Swinney actually killed Clark, the prosecution argued Swinney should be convicted of felony murder and the special circumstance found true based on the reckless indifference theory. Swinney isolates references in the People's closing argument and rebuttal to Swinney tying up Clark and not assisting him in order to suggest the prosecution advocated actual killer liability based on those actions alone, but reviewing the statements in context and the argument as a whole, those acts are described as the evidence of Swinney's entire course of conduct and are offered in conjunction with the argument Swinney actively beat Clark. The prosecution argued if the jury found Swinney beat Clark to death, he was the actual killer; and even if he did not strike "the killing blow," Swinney was culpable as a major participant who acted with reckless indifference to human life. Because the jury was not led to believe it could find Swinney an actual killer for a nonpersonal, indirect killing, *Garcia* does not require reversal here.

IV. **Evidentiary Ruling**

Swinney argues the trial court prejudicially erred as a matter of state law and federal constitutional law when it sustained his objections during cross-examination to two questions posed to Juan Carrillo, the forensic pathologist and medical examiner who testified about the cause of Clark's death. After Swinney's counsel elicited from Carrillo that it was part of his testimony "to make plain things that are not obvious" to lay people such as jurors and attorneys, Swinney's counsel asked, "[I]s it fair to say that many lay people would be unfamiliar with the fact that head trauma could lead to actual death[?]" The prosecutor objected on the basis the question called for speculation, and the court sustained the objection on the ground the subject was beyond the witness's expertise.

Defense counsel then asked, "[I]n your experience as a coroner—have you had the experience of having to explain to lay people how blunt force trauma to the head can[] actually be lethal?"[3] Carrillo responded affirmatively.

"And in so doing, have you had sometimes people have trouble understanding that?" Swinney's counsel asked. The prosecutor objected on relevance grounds, and the court sustained the objection on the basis of Evidence Code section 352. Defense counsel did not rephrase the question or ask to make an offer of proof but instead proceeded to cross-examine Carrillo on other topics.

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[3] The reporter's transcript records this word as "can't," but given the context, as Swinney notes, it is far more likely the intended word was "can."

"[W]e review trial court decisions about the admissibility of evidence for abuse of discretion. Specifically, we will not disturb a trial court's admissibility ruling ' "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (*People v. Morales* (2020) 10 Cal.5th 76, 97.)

The parties dispute whether Swinney forfeited his objection by failing to make an offer of proof. We need not resolve that question because even if preserved on appeal, there was no abuse of discretion here. With respect to the first question to which an objection was sustained, whether it was fair to say many lay people were unfamiliar with the fact that head trauma can be fatal, the court properly sustained the foundational objection made by the People. As no foundation had been laid showing Carrillo had the relevant experience or expertise to opine whether the general population was unfamiliar with this medical fact, this ruling was not an abuse of discretion. (Evid. Code, § 801, subd. (b) [expert opinion testimony limited to opinions "[b]ased on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"].)

After attempting to remedy the foundational deficiency of the prior question by eliciting testimony Carrillo had experience explaining to lay people how blunt force trauma to the head can be fatal, Swinney's counsel next asked Carrillo whether "sometimes people have trouble understanding" when he explained to lay people how blunt force trauma to the head can be

fatal. The trial court did not abuse its discretion when it sustained the objection to this question pursuant to Evidence Code section 352. " 'The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value.' " (*People v. Anderson* (2018) 5 Cal.5th 372, 406 (*Anderson*).) Whether some lay people experienced difficulty understanding the mechanism of death by blunt force head trauma when a medical examiner explained it to them had little to no relevance to any of the issues in this case. The trial court weighed the de minimis probative value of' evidence concerning how lay people respond to a medical examiner's explanation of how a blow to the head can be lethal " 'against the likelihood that its admission would require an "undue consumption of time" (Evid. Code, § 352), and soundly determined that the balance justified exclusion.' " (*Id.* at pp. 406–407.) Swinney has not established any error.

Swinney argues the expert's anticipated opinion lay people "did not generally know, or at least sometimes did not know, that a few fist blows to the head carried a significant risk of death" was relevant, probative, non-prejudicial, and would have tended to "defeat" the knowledge component of reckless indifference to human life. But Swinney never asked for this information in a proper manner. After the People's objection was sustained to Swinney's counsel's initial question whether lay people were generally aware blows to the head could kill, counsel did not pose the question again. Instead, once she laid the foundation, she asked whether sometimes people had difficulty understanding the medical examiner's explanation of how blunt force trauma can be lethal. That is not the same question as whether, in the expert's opinion, lay people are aware striking a person in the

head with fists creates a significant risk of death. As counsel chose to move on to other subjects of cross-examination rather than to re-ask the initial question that could potentially have yielded the evidence Swinney now contends would have been important, the court cannot be blamed for not admitting testimony Swinney did not properly elicit. (See *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 603 [appellant may not complain the trial court failed to do something it was not asked to do]; *People v. Davis* (1946) 76 Cal.App.2d 701, 705 [trial court "cannot . . . be criticized for failing to do what it was not asked to do"].)

V. Special Circumstances and Unanimity

Section 190.4, subdivision (a) provides, "Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance." Here, the information alleged two special circumstances: the murder was committed while engaged in robbery or attempted robbery (§ 190.2, subd. (a)(17)(A)) and the murder was committed during a burglary or attempted burglary (§ 190.2, subd. (a)(17)(G)). Although the prosecution correctly identified the special circumstances as distinct allegations, the jury instructions referred several times to "the special circumstance of murder during the commission of robbery or burglary," and the verdict form asked the jury to make a finding on both allegations at once: did Swinney commit the murder while he was "engaged in the commission of the crime of robbery and/or burglary"? Swinney argues this was error because the jury was not required to consider each special circumstance individually and to render a unanimous finding on each one. He contends the jury instructions exacerbated the

problem because they treated the special circumstances as a unit rather than individual allegations. This, Swinney maintains, violated state law and his federal constitutional rights to due process and a unanimous jury verdict, and is reversible per se. In the alternative, Swinney argues the error was prejudicial and reversal of the special circumstances finding is required.

Swinney is correct the two alleged special circumstances should have been separately listed on the verdict forms (§ 190.4; *People v. Davenport* (1985) 41 Cal.3d 247, 274–275), but his argument the error requires reversal per se is not well taken. Swinney analogizes this situation to a trial court imposing punishment on an enhancement not found true by the jury or selecting an elevated degree of a crime when the jury made no determination of degree. But here, the court did not improperly impose a punishment in the absence of a jury determination. Instead, the jury found true a special circumstance allegation that erroneously combined two distinct special circumstances. We therefore consider whether the error can be said to have been harmless beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1114, 1187 [jury instruction erroneously failing to instruct jury on an element of a special circumstance allegation harmless beyond a reasonable doubt]; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1205 [if other aspects of the verdict or the evidence leave no reasonable doubt the jury made the necessary findings, erroneous felony-murder instruction was harmless].)

We conclude the error was harmless beyond a reasonable doubt because no reasonable jurors could have concluded the murder took place during the commission of a burglary without also finding it took place during the commission or attempted commission of a robbery. The jury was instructed with only one

target offense for the burglary: robbery, so any jurors who concluded the crime was committed during a burglary also necessarily agreed Swinney intended to commit robbery, and the evidence clearly showed he executed that plan. Swinney argues the evidence of the robbery elements of immediate presence and possession was equivocal enough that it cannot be said beyond a reasonable doubt the jury must have found the elements satisfied, but the evidence established Clark was a laundromat employee staying late as a favor to a coworker, the ATM and the storage room were in extremely close proximity, Swinney participated in tying up Clark, and he entered the storage room where Clark's body was found. Under the specific facts of this case, there is no possibility the jurors failed to agree unanimously on the robbery special circumstance, and the failure to list the special circumstances separately on the verdict form does not require the special circumstance finding to be vacated.

VI. **Burglary Instruction**

Swinney argues the trial court had a sua sponte obligation to instruct the jury the burglary of a commercial establishment must involve an intended or actual loss of at least $950 when it gave the jury instructions on the murder charge and the burglary special circumstance allegation. The offense of shoplifting occurs when a person enters a commercial establishment with the intent to commit larceny while that establishment is open during regular business hours, if the property intended to be taken is valued at or below $950 (§ 459.5). Relying on *In re E.P.* (2019) 35 Cal.App.5th 792 and *People v. Jennings* (2019) 42 Cal.App.5th 664, in which the courts held that "to prove that a defendant committed section 459 burglary based on a theory of intent to commit larceny when entering a commercial establishment that

is open during regular business hours, 'the prosecution [has] the burden of proving beyond a reasonable doubt that [the defendant] did not commit shoplifting' " (*Jennings*, at pp. 670–671), Swinney argues the court should have instructed the jury the People were required to disprove, beyond a reasonable doubt, all the elements of shoplifting, particularly that the value of the items intended to be taken exceeded $950, before the jury could convict him of felony murder based on burglary.

The trial court had no duty to instruct the jury in this manner. The California Supreme Court has held when a person enters an area of a commercial establishment "objectively identifiable as off-limits to the public" with the intent to steal, the offense is a burglary regardless of the value of the property taken. (*People v. Colbert* (2019) 6 Cal.5th 596, 607–608.) "In enacting the shoplifting statute as part of Proposition 47, the electorate signaled that [the] interests [in protecting against the increased risk to personal safety attendant in the commission of a felony in specified structures and preventing the invasion of an owner's or occupant's possessory interest in a space against a person who has no right to be in the building] do not apply in the same way when a person intends to steal property in a place where he or she has been *invited* to peruse the goods and services that are on offer. Store owners and employees do not, of course, consent to the theft of property. But the core of the crime of burglary is not theft but physical intrusion, and owners and employees have every reason to expect that members of the public will enter where they have been invited. [¶] But it is different when members of the public venture into private back offices, employee locker rooms, or other interior rooms that are objectively identifiable as off-limits. The nature of the intrusion,

and the potential risk to personal safety, when a person exceeds the *physical* scope of his or her invitation to enter are not dissimilar from those associated with exceeding the *temporal* scope of the invitation by entering after regular business hours—conduct that clearly remains punishable as burglary after the enactment of section 459.5." (*Id.* at p. 607.)

Here, the evidence established Swinney entered two areas of the laundromat objectively identifiable as off-limits to the general public: the storage room and the interior of the ATM. The storage room was marked with a sign indicating it was for employees only; it was separated from the public areas of the laundromat with a door; it was of a significantly different character than the spare public areas of the establishment, containing a couch, chair, television, and personal possessions; and it contained an item one would not typically allow the public to freely access: the electronic device that recorded the security cameras in the laundromat. The interior of the ATM was off-limits not only to the public but also to employees—neither Clark nor Williams had keys to it. Swinney admitted he broke into the ATM, and his DNA was recovered from blood inside the machine. "The interior of an ATM, like a locked vault inside a bank, was objectively identifiable as off-limits" to the public. (*People v. Osotonu* (2019) 35 Cal.App.5th 992, 997.) Entry into the ATM's interior is burglary. (*Ibid.*) Although Swinney attempts to distinguish *Osotonu* on the ground Swinney used a prying tool to open the ATM while the defendant in Osotonu used explosives, the *Osotonu* court found the offense to be burglary rather than shoplifting not because the defendant used explosives but because he breached the interior of the ATM, an area objectively identifiable as off-limits to the public, with the intent to steal.

(*Id.* at p. 998.) The evidence was abundant Swinney's intent in entering the ATM and the storage room was to steal. The value of the items he intended to steal is irrelevant here. The trial court had no sua sponte duty to instruct the jury the prosecution was required to prove the value of the property intended to be taken exceeded $950.

VII. **Alleged Prosecutorial Misconduct**

Defense counsel focused in closing argument on the absence of direct evidence Swinney entered the storage room or killed Clark. On rebuttal, one of the two prosecutors argued to the jury, "Now, what the defense wants you to believe is that because there's no direct evidence that [Swinney] gave the final killing blow, that he is somehow not guilty of all the charges, that's frankly not true factually and it's not true legally. [¶] I'm telling you, based upon all the evidence, that [the other prosecutor] and I believe he is the actual killer. You can't separate out the killing blow, okay. But even if he's not the actual killer, for example, if this was a homicide with a gun case, say it's the most stereotypical robbery where someone goes into a liquor store and they kill the clerk and then the other guy is also charged with murder. So in that case, obviously, the killing blow would be the gunshot wound. We don't have that in our case. What we have is a group beating." The prosecutor then laid out the evidence tending to prove Swinney was Clark's actual killer. The prosecutor also argued even if the defense argument were true and the evidence did not establish Swinney as the actual killer, Swinney was still guilty of felony murder on a reckless indifference theory, and he discussed the evidence supporting that theory of liability. The prosecutor concluded by reminding the jury of its role as the finder of facts.

Swinney argues the prosecutor vouched he (Swinney) was the actual killer when he told the jury that based on the evidence the prosecutors believed Swinney had actually killed Clark. " 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' " (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

To preserve a claim of prosecutorial misconduct for appeal, a defendant must timely object to the misconduct and ask the trial court to admonish the jury. (*People v. Valencia* (2008) 43 Cal.4th 268, 281.) Swinney did not object to the prosecutor's comments, but he argues the failure to object is waived because the misconduct could not have been cured by admonition and because the failure to object constituted ineffective assistance of counsel. We address the merits of the issue because Swinney argues his trial counsel's failure to object constituted ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668 as there could be no valid tactical reason for failing to object. (See *People v. Nation* (1980) 26 Cal.3d 169, 179.)

" 'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337.) We " 'view the statements in the context of the argument as a whole.' " (*People v. Rodriguez* (2020) 9 Cal.5th 474, 480.)

Improper vouching occurs when a prosecutor "either (1) suggests that evidence not available to the jury supports the argument, or (2) invokes his or her personal prestige or depth of experience, or the prestige or reputation of the office, in support of the argument." (*Anderson*, *supra*, 5 Cal.5th at p. 415.) Prosecutors may not offer personal opinions based solely on their experience or on facts outside the record (*People v. Huggins* (2006) 38 Cal.4th 175, 207), nor may they express a personal belief in a defendant's guilt when there is a substantial danger the jury will view the comments as based on evidence outside the record at trial. (*People v. Mincey* (1992) 2 Cal.4th 408, 447.) However, a prosecutor may assert his or her belief in the defendant's guilt when that assertion is followed immediately by a discussion of the evidence upon which that belief is based, provided the prosecutor has not implied his or her opinion is based on evidence not presented at trial. (*People v. Lopez* (2008) 42 Cal.4th 960, 971.)

Swinney argues the prosecutor invoked his prestige as a government prosecutor, the prestige of his counsel, and the prestige of his office. He claims the prosecutor exhorted the jury to defer to authority rather than to draw conclusions based on the evidence. He asserts the jurors "likely assumed" the prosecutor's argument was based on evidence outside the record. Swinney argues because the prosecutor said his view was based on "all the evidence" but failed to restrict the evidence to that presented at trial, the prosecutor's words actually suggested the opinion was based on evidence not presented. He contends even if the evidence to which the prosecutor referred was the evidence in the record, jurors would have recognized he "did not intend the jurors take at face value any implied protestation that the prosecutor was just asking the jurors to look at the evidence and see for themselves."

Viewing the record as a whole, we identify no substantial danger the jury would have viewed the prosecutor's comments as based on evidence outside the record at trial. The prosecutor expressly stated he and his co-prosecutor believed Swinney to have been the actual killer based on the evidence. He acknowledged the difficulty in separating out which actor inflicted the fatal blow; he presented in detail the evidence supporting the People's theory Swinney had actually killed Clark; and he laid out the evidence supporting the prosecution's alternate theory that even if Swinney was not the actual killer, he was nonetheless guilty of murder. He alluded to no matters outside the record and did not vouch for the strength of the People's case based on personal or professional prestige. There is also no suggestion in the record that although the prosecutor may have limited the basis for his opinion to the evidence produced at

trial, he actually intended for the jury to conclude he meant the basis for his opinion included matters outside the record. Swinney has not shown a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.

VIII. **Ex Parte Communication**

During deliberations, at 2:05 p.m. on May 28, 2019, the jury sent out a request for copies of the transcripts of the testimony of two witnesses. According to the minute order, the court directed the court clerk "to inquire of the juror foreperson whether complete testimony for two witnesses is being requested, or a specific portion of a witness'[s] testimony. The jury foreperson will confer with [the] jury and summon the bailiff when the written request is completed."

Although the record does not indicate exactly when counsel and Swinney were alerted to the jury's request, all parties and Swinney were present in the courtroom by 2:27 p.m. At that time the court described the contents of the jury's note, advised the parties it had "asked the court clerk to ask the jury if there was some way to refine the request of what it is they are seeking from both of these witnesses. Is there one particular point they're having trouble with. And we received this note: [¶] 'It is unclear whether or not the defendant had past criminal activity, for example, arrests, bookings, convictions, or just informal run-ins with authority. Or this was criminal activity associated with other members in this particular gang?' "

Neither the prosecutor nor the defense attorney expressed any surprise, objection, or concern at the court's on-the-record recitation of its actions. The court suggested a possible answer to the jury's note, and told the parties, "If there's a suggestion from either side, I'd appreciate hearing it." Counsel and the court quickly reached agreement on a response to the jury. The court agreed to all defense suggestions concerning the phrasing and content of the reply.

On appeal, Swinney argues his conviction should be reversed because sending the clerk to inquire about the jury's request (1) constituted an improper ex parte communication in the absence of counsel; (2) improperly delegated to the clerk the role of ascertaining whether the jury could narrow its request; and (3) denied him his Sixth and Fourteenth Amendment rights to be personally present at all critical stages of his trial.

Assuming error that was not forfeited, it was harmless beyond a reasonable doubt. " 'Although [ex parte] communications violate a defendant's right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error, reversal is not required where the error can be demonstrated harmless beyond a reasonable doubt.' " (*People v. Delgado* (1993) 5 Cal.4th 312, 330.) Applying that standard here, the result here could not have been more innocuous. The jury's inquiries clearly pertained to the evidence supporting the gang enhancement allegation, which the jury ultimately found to be not true. Any error was harmless beyond a reasonable doubt.

IX. Changes to the Felony Murder Law

Senate Bill No. 1437 (2017-2018 Reg. Sess.), effective January 1, 2019 (Stats. 2018, ch. 1015), changed the felony murder law to require an aider and abettor either intend to kill or be a major participant who acts with reckless indifference to human life, making the elements establishing the crime of felony murder coextensive with the elements of the felony-murder special circumstance. As a result of this change, Swinney argues the special circumstances finding should be stricken on the ground section 190.2 violates the Eighth Amendment and California law because it "no longer adequately narrows the class of defendants eligible for the death penalty."

The People argue this claim is forfeited because Swinney did not contemporaneously object to the felony-murder special circumstance on Eighth Amendment grounds. However, the cases on which the People rely, *People v. Speight* (2014) 227 Cal.App.4th 1229, 1247 and *People v. Russell* (2010) 187 Cal.App.4th 981, 993, stand for the principle a claim a sentence was cruel and unusual must be raised in the trial court because it usually requires a fact-bound inquiry. Swinney's argument is not dependent on facts found at trial, but is instead a contention the sentencing scheme is legally invalid under the Eighth Amendment. He did not forfeit this issue by failing to object at trial.

Nevertheless, Swinney's argument fails because the constitutionality of the felony-murder special circumstance is based not on the former distinction between death-eligible felony murderers and felony murderers not eligible for the death penalty, but on the distinction between death-eligible felony murderers and simple murderers. "[B]y making the felony

murderer but not the simple murderer death-eligible, a death penalty law furnishes the 'meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " (*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, superseded by statute on other grounds as stated in *People v. Mil* (2012) 53 Cal.4th 400, 408–409; see also *People v. Covarrubias* (2016) 1 Cal.5th 838, 934; *People v. Bonillas* (1989) 48 Cal.3d 757, 780 ["the statutory scheme making felony murder but not simple murder death eligible does not violate the federal Constitution"].)

Additionally, the California Supreme Court has rejected identical Eighth Amendment challenges to other special circumstance provisions, observing the special circumstance "would satisfy federal constitutional requirements for death eligibility even were the amendment to have made the special circumstance *identical* to" the theory of first degree murder. (*People v. Johnson* (2016) 62 Cal.4th 600, 636 [lying-in-wait special circumstance]; *People v. Catlin* (2001) 26 Cal.4th 81, 109 [murder-by-poison special circumstance], overruled on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242, 1253–1256.) We are bound by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.